

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

ERD V. CROWELL,

Appellant,

vs.

BAKER OIL TOOLS, INC., a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

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No. 8850.

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APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

(Rule 24, Paragraph 2, Subdivision (b).)

In this suit issues of title, validity, scope, and infringement of letters patent of the United States are involved.

The bill of complaint alleges jurisdiction of the District Court [Tr. 4, par. III] as dependent upon the patent laws of the United States. Defendant's counterclaim and answer to the bill of complaint [Tr. 13, par. III] admits said jurisdictional averment.

The statute, as set forth in 7, F. C. A., title 28, section 41, subdivision (7) (R. S., sec. 629, par. 9; March 3, 1911, c. 231, sec. 24, par. 7, 36 Stat. 1092) is relied upon as sustaining jurisdiction of the District Court.

This is an appeal from a "final" decree [Tr. 66] dismissing defendant's counterclaim (charging patent infringement) with costs to plaintiff,

The jurisdiction of this Court on this appeal is by virtue of the law as set forth at 7, F. C. A., title 28, §225, Judicial Code, §128, amended, (a) review of final decisions.

This appeal was taken within three months after the entry of said decree appealed from as required by 7, F. C. A., title 28, §230 (March 3, 1891, c. 517, §11, 26 Stat. 829; Feb. 13, 1925, c. 229, §8 [c], 43 Stat. 940; Jan. 31, 1928, c. 14, §1, 45 Stat. 54).

As showing that the appeal was taken within the time allowed by law, see decree [Tr. 66-67] appealed from, date of entry August 24, 1937, and appeal perfected [see petition for appeal, Tr. 338], and assignments of error [Tr. 340], and order allowing appeal [Tr. 360] November 15, 1937, bond on appeal [Tr. 361] being approved and signed November 18, 1937—all within three months after the entry of said decree appealed from, time for filing and docketing this cause on appeal having been subsequently, by a series of stipulations and orders, extended.

Concise Abstract or Statement of the Case.

(Rule 24, Paragraph 2, Subdivision (c).)

This cause is before the Court on the broad general issue of whether or not a LICENSE under certain letters patent pertaining to oil well cementing was properly rescinded under §1689 of the Civil Code of the state of California, which code section, so far as pertinent, reads as follows:

“§1689. GROUNDS.—A party to a contract may rescind the same in the following cases only:

“1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by

mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party;

“2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part;

“3. If such consideration becomes entirely void from any cause;

“4. If such consideration, before it is rendered to him, fails in a material respect from any cause;”

(Paragraphs 5 and 6 omitted as of no possible pertinence.)

The parties are both manufacturers of oil well cementing apparatus, each owning certain patents relating thereto.

In August, 1935, they EXCHANGED LICENSES, defendant-appellant, Crowell, granting to plaintiff-appellee, Baker Company, a license [Plaintiff's Exhibit 2, offered in evidence Tr. 69, copied Book of Exhibits, p. 13] to manufacture and sell the subject-matter of two patents owned by Crowell, namely, No. 1,432,017 and Reissue No. 16,516; and plaintiff-appellee, Baker Company, *as a vital part of the consideration for said license from Crowell*, contemporaneously executed and delivered to Crowell a LICENSE [Defendant's Exhibit A, offered in evidence Tr. 78, copied Book of Exhibits, p. 129] to make and sell certain *specifically described apparatus*, namely, devices under Baker Patent No. 1,859,648 [Defendant's Exhibit C, offered in evidence Tr. 79, copied Book of Exhibits, p. 135] as in said license provided, that is to say:

“* * * with the expressed limitation that the devices which the said Erd V. Crowell may manufac-

ture and sell must employ poppet type spring pressed valves and shall not employ ball valves, or their equivalent, as shown in the patent.”

Now, defendant-appellant, Crowell, before thus exchanging licenses with plaintiff-appellee, Baker Company, had perfected a new cementing means and method and had an application pending for letters patent therefor, which letters patent has since been granted.

The subject-matter of such then prospective patent to Crowell is illustrated and described in Defendant’s Exhibit E, folder entitled “The New and Improved Crowell Cementing Shoe” [offered in evidence Tr. 91, Book of Exhibits, p. 143]; but the subject-matter of this then prospective patent to Crowell *was dominated* by certain broad claims (later in argument to be considered) of said Baker Patent No. 1,859,648 [Defendant’s Exhibit C, Book of Exhibits, p. 135].

“The New and Improved Crowell Cementing Shoe,” as described in Defendant’s Exhibit E [Book of Exhibits, p. 145] was obviously very valuable and Crowell earnestly desired to enter upon the commercial exploitation of said device, but, while he believed he had a good defense to any suit by plaintiff-appellee, Baker Company, charging infringement of said Baker patent if he, Crowell, made and sold the devices of said Defendant’s Exhibit E, he desired to avoid the harassment of such possible suit by securing a license from the Baker Company under said Baker patent.

On the other hand, plaintiff-appellee, Baker Company, having long been menaced by Crowell Patents No. 1,432,017 and Reissue No. 16,516, desired a license under such patents to avoid a probable decision in favor of

Crowell and heavy damages and profits for long continued past infringement of said two Crowell patents.

The license to Crowell [Defendant's Exhibit A, Book of Exhibits, p. 129] under said Baker Patent No. 1,859,648 [Defendant's Exhibit C, Book of Exhibits, p. 135] being in effect, as we shall see in argument, a license under certain broad claims of said patent (as construed by the "expressed limitation" above quoted as to poppet type valves), *under clear admissions* (as we shall later see) EXACTLY DESCRIBED, COVERED, AND INCLUDED Crowell's Exhibit E [Book of Exhibits, p. 143]; so that, when Crowell negotiated and obtained said license in exchange for the license, Plaintiff's Exhibit 2 [Book of Exhibits, p. 13], he did so in the belief and with the conviction that he had the right to manufacture and sell the subject-matter illustrated in said Defendant's Exhibit E without being molested by suit on behalf of plaintiff-appellee, Baker Company. *In fact (and this stands out uncontrovertibly in the evidence), Crowell certainly would not have insisted upon said license under said Baker patent, Defendant's Exhibit C [Book of Exhibits, p. 135] if he had not been convinced, and did not believe that such license gave him a right to manufacture and sell the devices described in said license (which obviously covers said Defendant's Exhibit E) as there could have been no reason for demanding such license EXCEPT FOR THE PURPOSE OF MANUFACTURING AND SELLING THE DEVICES OF SAID DEFENDANT'S EXHIBIT E.*

Now, it is true that on behalf of plaintiff-appellee it is contended (quite untenably, we insist) that Crowell's license, Defendant's Exhibit A, covers (with some mysterious, vaguely suggested, but not defined addition) *only* the subject-matter of one of Crowell's old applications which,

after allowance by the Patent Office, was abandoned by Crowell AND THUS BECAME PUBLIC PROPERTY many years before—but *such contention obviously destroys said license, Defendant's Exhibit A* [Book of Exhibits, p. 129], AS NO CONSIDERATION WHATSOEVER FOR CROWELL'S LICENSE TO BAKER COMPANY.

The conviction on the part of Crowell prior to and at the time of the contemporaneous execution and delivery of the two cross-licenses that under said license from Baker Company he (Crowell) had full authority to manufacture and sell the devices of Defendant's Exhibit E [Book of Exhibits, p. 143], while quite obvious (as will later in argument be made clear), from a comparison of very broadly claimed subject-matter of said Baker patent with the device of said Defendant's Exhibit E, was STRENGTHENED (as a detailed consideration of the evidence in argument will show) by *prior understanding and agreement to that effect* between himself and Oscar A. Mellin (chief attorney for plaintiff-appellee on this appeal), who was acting as negotiating agent for plaintiff-appellee, Baker Company, in consummating such exchange of licenses, and who, as attorney, had drafted said then proposed agreements.

Circumstances to be later greatly emphasized (IF CROWELL'S LICENSE FROM BAKER DOES NOT MEAN WHAT WE SAY IT DOES) as sustaining the charge of undue influence and fraud in support of said rescission, are that Mellin had been, during most of the immediately prior negotiations ALSO THE ATTORNEY FOR CROWELL, and had successfully prosecuted, on behalf of Crowell, very important litigation, and Crowell, greatly pleased with the outcome of such litigation, had every reason to be and was, in fact, very friendly toward Mellin.

While, of course, Crowell recognized that Mellin, in preparing the then proposed cross-licenses and in negotiating for their execution, was acting for plaintiff-appellee, Baker Company, yet, by reason of the still existing or just terminated pleasant and confidential relationship of attorney and client between Mellin and himself, Crowell had not the slightest suspicion that Mellin would by silence when he should have spoken, by tacit admissions, by active representations, or otherwise, have deceived or imposed upon him. Crowell was a layman, not a lawyer, and, as the evidence will show, supposed that Mellin could fairly act for both parties.

True, Crowell did, just before the execution of the two agreements, suggest that he be given time to take such proposed contracts to his attorney (Westall), who was handling, among others, the patent application on the device of Defendant's Exhibit E, and to secure the advice of Westall regarding said agreements, BUT MELLIN (*himself advising and assuring Crowell that the said cross-license had the scope and legal effect as then and now insisted by Crowell*) DECLINED TO GRANT THE NECESSARY TIME TO PERMIT WESTALL TO EXAMINE THE CONTRACTS, AND INSISTED THAT THEY BE EXECUTED BY CROWELL WITHOUT THE ADVICE OF HIS SAID ATTORNEY, which Crowell (quite mistakenly, as it now appears) did.

After the mutual execution and delivery of said cross-licenses [Plaintiff's Exhibit 2 and Defendant's Exhibit A] and after it became apparent to plaintiff-appellee, Baker Company, that "The New and Improved Crowell Cementing Shoe" described in Defendant's Exhibit E [Book of Exhibits, p. 143] was successful and would doubtless make Crowell a serious competitor of the Baker Company, plaintiff-appellee, Baker Oil Tools, Inc., through its

attorney, Mellin, as chief counsel, brought this suit charging that the manufacture and sale by Crowell of said devices of Defendant's Exhibit E constituted infringement of three *other patents* owned by Baker Oil Tools, Inc.

On the part of defendant-appellant, Crowell, it was apparent that the filing of this suit charging such infringement, notwithstanding Crowell's license [Defendant's Exhibit A, Book of Exhibits, p. 129] CONSTITUTED A REPUDIATION OF SAID LICENSE AND RESULTED IN A LEGAL EVICTION OF RIGHTS GRANTED TO CROWELL IN SAID LICENSE. Accordingly, Crowell served the NOTICE OF RESCISSION [Defendant's Exhibit B, introduced in evidence Tr. 78, Book of Exhibits, p. 131], there being contained and set forth in said notice of rescission charges that plaintiff had, by the institution and maintenance of this suit, nullified its said license [Defendant's Exhibit A, Book of Exhibits, p. 129] and had withdrawn and denied a most important part of the consideration for the contemporaneously issued license [Plaintiff's Exhibit 2, Book of Exhibits, p. 13].

Now, it is true that in said license from Baker Company to Crowell [Defendant's Exhibit A, Book of Exhibits, bottom of p. 129] it is provided:

"It is expressly provided that said Erd V. Crowell is not licensed under any other patent or patents owned or controlled by said Baker Oil Tools, Inc."

This sentence in said Crowell license, Defendant's Exhibit A, is plaintiff-appellee's sole pretense of justification for filing this suit which, asking an injunction and accounting against Crowell for the manufacture and sale of the devices of Defendant's Exhibit E, as above explained,

virtually nullifies or repudiates Crowell's license AND MAKES THE SAME NO MORE VALUABLE THAN BLANK PAPER.

On behalf of Crowell it will be insisted in the argument to follow that such express denial to Crowell of any license "under any other patent or patents owned or controlled by said Baker Oil Tools, Inc.," was not intended to mean "You may manufacture and sell the devices of Defendant's Exhibit E, but this authority will do you no good because we will enjoin you under other patents which we hold from exercising this right"—and cannot consistently be construed to nullify the express license to manufacture and sell said SPECIFICALLY DESCRIBED STRUCTURE, but is properly construed only to cover OTHER SUBJECT-MATTER which might be added to or incorporated in the apparatus expressly licensed [Defendant's Exhibit E] *and which additional subject-matter may be covered by such other patent or patents.*

There is no pretense nor suggestion in this suit that defendant *has added to or incorporated in* the expressly licensed subject-matter anything else covered by any other patent or patents owned or controlled by plaintiff-appellee—the charge is that the manufacture and sale of the device of Defendant's Exhibit E ALONE, AS ILLUSTRATED, constitutes infringement of such other patents sued on and, CONVERSELY, IT IS ALSO ADMITTED THAT IF CROWELL'S ACTS IN THE PREMISES ARE AUTHORIZED BY SAID CROSS-LICENSE, THERE IS NO INFRINGEMENT OF ANY OTHER PATENT OWNED BY APPELLEE, BAKER.

Briefly summarizing important facts for the purpose of deserved emphasis, preliminarily to a presentation of Crowell's position on certain controlling issues: Mellin,

the negotiator and attorney for Baker Company, was also during negotiations which led to the execution of the two licenses, and had been, the attorney for Crowell, and while Crowell, of course, knew that Mellin was also representing the Baker Company, he had no reason to suspect that Mellin would take any undue advantage of him—on the contrary, he had a right to expect from Mellin an extraordinary amount of frankness and fair dealing.

Remember again: Mellin opposed Crowell's suggestion that he have the licenses checked by Crowell's attorney handling his patent applications at the same time assuring and advising Crowell that the cross-license would protect Crowell from just such a suit as that at bar—*when there is the strongest reason for believing (according to his present contentions) that Mellin believed Crowell was making a mistake and needed unprejudiced professional advice.*

Briefly, it will be Crowell's contention on the argument to follow:

1. If Mellin, under the circumstances, inserted the clause in Crowell's license about other patents owned by Baker Company as a "joker" intended to nullify the apparently clear previous license to make and sell a certain specific device, including the devices of Defendant's Exhibit E, KNOWING THAT SUCH A LICENSE WAS NO BETTER FOR CROWELL'S PLAINLY EXPRESSED PURPOSE (THE AVOIDANCE OF JUST SUCH A SUIT AS THIS) THAN BLANK PAPER, then Baker Company, through its agent and attorney, was

guilty of fraud, justifying Crowell's notice of rescission [Defendant's Exhibit B, Book of Exhibits, p. 131].

2. If Crowell gave his consent to said cross-licensing arrangement believing that he had a right to exploit the devices of Defendant's Exhibit E, notwithstanding any other patents owned by the Baker Company, and such, in fact, was *not* true, then he gave his consent by mistake, and under paragraph 1 of said §1689, C. C., Crowell's said notice of rescission [Book of Exhibits, p. 131] is justified.

3. If both Mellin (as agent, attorney, and representative of Baker Company) and Crowell construed the sentence as to other patents owned by the Baker Company as above indicated, namely, that it was only intended to cover possible "additions" to the expressly licensed subject-matter, *when, in legal effect*, its result was to nullify the express license to manufacture and sell, then there was a mutual mistake which surely justifies a rescission under equitable principles, even without invoking §1689, C. C.

4. If Mellin, then or immediately before, being the attorney of Crowell and enjoying his trust and confidence, took advantage of Crowell's evident reliance upon Mellin's representations, and secured Crowell's signature to a document entirely worthless as giving him a right to manufacture and sell the device it seemed to cover, and Mellin knew at the time it was entirely worthless as effectuating Crowell's intent, then there was not only fraud but undue influence on the part of Baker Company through Mellin

as its agent and attorney, justifying said rescission [Book of Exhibits, p. 131] under said code section.

5. If said license to Crowell means "You may under one patent; but you may not under three patents; therefore, you may not," then a most important part of the supposed consideration has wholly failed—or it never existed, which, under paragraphs 2, 3 and 4 of said §1689, C. C., justifies said rescission [Book of Exhibits, p. 131].

6. By the institution of this suit and by the position taken on behalf of plaintiff-appellee as to what the subject-matter of said Crowell license [Defendant's Exhibit A, Book of Exhibits, p. 129] covers, namely, that it covers only with or without some vaguely suggested addition the disclosures of an old abandoned application, CLEARLY PUBLIC PROPERTY (as will be developed on argument), the consideration of said license has either wholly failed or is distinctly recognized on behalf of plaintiff-appellee as never having existed, and the rescission under subdivision 2 of said §1689, C. C., is justified.

It has been thought that the foregoing statement, avoiding technicalities and setting forth only salient evidentiary circumstances (to be substantiated and amplified under appropriate heads in the argument), would most quickly give the Court an understanding of what we contend to be the merits of this appeal. However, for a full grasp of the issues and an understanding of how they are raised, the following state of the pleadings and nature of the hearing are included under this heading.

The Pertinent Pleadings.

The complaint [Tr. 3] charges infringement of three United States letters patent. In defendant's answer [Tr. 21, "Second Affirmative Defense"] defendant pleads a LICENSE to manufacture, use and sell the subject-matter in issue of each of the three letters patent so sued on.

As there is no issue on this appeal involving the validity, subject-matter, or scope of plaintiff's said patents, they need not be identified nor their subject-matter explained.

Defendant's counterclaims [Tr. 22], part of the answer [Tr. 13] to the bill of complaint [Tr. 3], charges infringement by plaintiff of two United States letters patent granted to and owned by defendant Crowell, namely, No. 1,432,017, and Reissue No. 16,516.

As there is no issue on this appeal involving the validity, subject-matter, or scope of the patents so set up by way of counterclaim, identification as above, by name and number only, will be sufficient for all purposes of this appeal.

To defendant's said counterclaim charging infringement of Patent No. 1,432,017 and Reissue Letters Patent No. 16,516, plaintiff in its "Answer to Counterclaims" [Tr. 32, par. I] in turn pleads a LICENSE to manufacture and sell devices covered by said defendant's patents.

Thus, to summarize the effect of the pertinent pleadings:

To plaintiff's charge of infringement of its three patents defendant justifies the acts charged as infringements by contending that they were performed under and by virtue of plaintiff's license to defendant; and to defendant's charges of infringement of defendant's two patents, plaintiff justifies the acts charged as infringements by contending that they were performed under and by virtue of the authority of defendant's license to plaintiff.

The Trial—Its Limited Issues.

In this state of the pleadings, by agreement of counsel [as appears from Order of Court of July 16, 1937, Tr. 54] the cause was set, under the authority of that portion of Equity Rule 29 reading,—

“* * * Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court.”

—for hearing—said hearing being expressly limited to include only [Order of Court, bottom of Tr. 54]

“* * * Defendant’s counterclaim, the Plaintiff’s defense of license to the same and the Defendant’s attack thereon upon the ground of mistake, fraud, undue influence, inadequacy and failure of consideration and the like.”

While it will at once be noted that the case was *not* set for hearing on *defendant’s* defense of license to plaintiff’s three patents [pleaded Defendant’s Answer as “Second Affirmative Defense”, bottom of Tr. 21, *et seq.*—said license being Defendant’s Exhibit A, offered in evidence Tr. 78, copied Book of Exhibits page 129], it will be found false to assume (as the foregoing extended statement of circumstances will emphasize) that much consideration of the meaning and effect of defendant’s said license is not necessary to a proper decision of the issues on this appeal, as the licenses are cross-licenses, contemporaneously executed and delivered, one being consideration for the other, and there are questions of fraud, mistake, undue influence, and partial failure of consideration involved, which require a determination of the meaning and effect of plaintiff’s said license to defendant.

Continued Existence of Plaintiff's Pleaded License The Broad General Issue.

As above explained, the pertinent pleadings [Defendant's Counterclaims, Tr. 22, and Plaintiff's Answer to Counterclaims, Tr. 32], *on their face*, seem to present only the bare question of whether or not defendant granted to plaintiff a license to manufacture and sell the subject-matter of defendant's two patents.

If a replication or rejoinder were permissible in equity pleading, it would, in effect, have been,—

“True, Plaintiff *had* a license as set forth in Plaintiff's Answer to Defendant's Counterclaim, but the same was rescinded under §1689, Civil Code of the State of California, before the filing of Defendant's Counterclaim for infringement; and at the times charged in said counterclaim Plaintiff had no license.”

In other words, not only the grant of the license, *but its continued existence*, is put in issue by the pleadings as framed, there being no authority in law for any *pleading* of subsequent rescission. The notice of rescission is offered as Defendant's Exhibit B at Tr. 78, and is set forth in the Book of Exhibits at page 131.

Specification of Assigned Errors to Be Relied Upon. (Rule 24, Paragraph 2, Subdivision (d).)

Each and every of the assigned errors I [Tr. 340, *et seq.*] to XLIV [Tr. 359] are relied upon, but only numbers I, II, IV [Tr. 340], VI, VII, VIII, IX, X [Tr. 341], XI, XII, XIII [Tr. 342], XIV, XV [Tr. 343], XVI [Tr. 344], XIX [Tr. 345], XXI, XXII [Tr. 346], XXIV, XXV [Tr. 347], XXXIV, XXXV [Tr. 350], XL [Tr. 351], XLI [Tr. 352], XLVI [Tr. 353], LVIII [Tr. 356], and LXI [Tr. 358], to avoid undue prolixity, are quoted in the argument to follow.

Summary Preceding Argument.

(Rule 24, Paragraph 2, Subdivision (e).)

Questions which obviously must engage our attention on the argument to follow are:

- I. What did Crowell's license [Defendant's Exhibit A, under Baker Patent No. 1,859,648] cover?

Does it cover (as contended on behalf of defendant-appellant) the device of Defendant's Exhibit E [Book of Exhibits, page 143] or does it ONLY license (as contended on behalf of plaintiff-appellee) the manufacture and sale of the subject-matter with some not clearly defined addition of a prior application of Crowell [Defendant's Exhibit G, offered in evidence, Tr. 126, and brought up as a physical exhibit], which application, after allowance, was ABANDONED BY CROWELL LONG PRIOR TO THE ALLEGED INVENTION OF SAID BAKER PATENT NO. 1,859,648, by which abandonment (a matter of obvious and elementary law) its subject-matter became PUBLIC PROPERTY—*open to anyone to use without license from Baker or anybody else.*

- II. The great admitted value of the subject-matter licensed by Crowell to plaintiff-appellee in Plaintiff's Exhibit 2 [Book of Exhibits, page 13], namely, the right to manufacture and sell under Crowell Patents Nos. 1,432,017 and Reissue 16,516, will be shown IN CONTRAST with the totally worthless subject-matter of defendant-appellant's license, Defendant's Exhibit A, under plaintiff-appellee's contention that said license, Defendant's Exhibit A, only authorizes the exploitation of what was plainly pub-

lic property long before said license, and unless it also covers, as we contend, the device of Defendant's Exhibit E.

- III. That Crowell's license [Defendant's Exhibit A, Book of Exhibits, page 129] might as well have been blank paper if, as contended by plaintiff-appellee, it covers only what Crowell, as a member of the public, had enjoyed long before said alleged license, and if it does not cover the device of Defendant's Exhibit E.
- IV. That the institution of this suit charging Crowell with infringement by reason of the manufacture and sale of the device of Defendant's Exhibit E [Book of Exhibits, page 143], ignoring Crowell's said license, constitutes in law an eviction—a failure of consideration justifying Crowell's said rescission.
- V. That if said license to Crowell, Defendant's Exhibit A [Book of Exhibits, page 129] does not cover and include the device of Defendant's Exhibit E [Book of Exhibits, page 143], then Crowell's consent to such exchange of licenses was a mistake authorizing Crowell's said rescission.
- VI. That if said license to Crowell [Defendant's Exhibit A, Book of Exhibits, page 129] does not cover and include the device of Defendant's Exhibit E, then Crowell's consent to said cross-licensing was a fraud on Crowell, or was obtained by undue influence and under subdivision 1 of §1689 C. C., Crowell properly rescinded.

ARGUMENT.

During the Negotiations Preceding the Execution of the Cross-Licenses Involved, Appellant, Crowell, Showed to and Discussed With Appellee, Baker, Through Its Attorney, Oscar A. Mellin, the File Wrapper and Contents [Defendant's Exhibit G, Offered Tr. 126, Brought Up as a Physical Exhibit] of an Application Which Had Been Filed by Crowell in 1925 and Later, After Allowance by the Patent Office, Abandoned by Crowell, All of Which Occurred Long Before the Alleged Invention of the Baker Patent [Defendant's Exhibit C, Book of Exhibits, Page 135] Forming the Subject-Matter of Defendant-Appellant's Cross-License [Defendant's Exhibit A, Book of Exhibits, Page 129].

The Reason Why Crowell Exhibited and Discussed This Old Abandoned Application Was to Make Clear to Appellee, Baker, Through Mellin, That the Subject-Matter of Baker Patent [Defendant's Exhibit C, Book of Exhibits, Page 135], Though Presumptively Valid, Was in Fact, Void, and Would Be Quite Vulnerable in Any Infringement Suit, as Certain of the Broad Claims of Said Baker Patent Read on, Described, and Covered Subject-Matter of This Abandoned Application.

At the Same Time, Crowell Also, for a Like Reason, i. e., to Show the Real Lack of Value of Said Baker Patent No. 1,859,648 [Defendant's Exhibit C, Book of Exhibits, Page 135] Exhibited to Mellin an Article From "The Oil Weekly" of September 17, 1926, Demonstrating That Subject Matter Common to Said Abandoned Application and to Said Baker Patent, and Covered by Broad Claims of the Latter, Had Been Described in the

Printed Publication Before the Date of Alleged Invention of Baker and, Therefore, Under Elementary Law, (Though It Would Take an Adjudication to So Establish) WAS ANTICIPATED AND VOID.

We now present argument in support of Assignments of Error II [Tr. 340]; VIII [Tr. 341]; XLI [Tr. 352]:

“II.

In decreeing that the license from defendant to plaintiff, dated August 1, 1935, is a valid, subsisting agreement in full force and effect and supported by an adequate consideration.”

“VIII.

In finding (Paragraph V of the Findings of Fact upon which said decree of August 24, 1937 was based) that the monetary consideration expressed in the written agreement, Plaintiff’s Exhibit 2, was fully and entirely adequate and in thereby implying that other considerations not specifically stated in said agreement might be ignored.”

“XLI.

In failing to find that unless Defendant’s Exhibit A covers and includes devices such as described and illustrated in Defendant’s Exhibit E, that said license, Defendant’s Exhibit A, is wholly ineffectual and worthless, and grants to defendant Crowell no right that he did not have before the execution of said agreement, Defendant’s Exhibit A.”

Crowell, though a layman, was unusually well versed in patent law. This is shown where, near the bottom of Tr. 254, after having testified that he personally, and not his attorney, wrote a certain letter discussing the validity of the Baker patent in question [Defendant’s Exhibit C, Book of Exhibits, p. 135] the trial court, after remarking

that Crowell showed an expert use of terms in patent law, further commented:

“Well, he certainly uses the terminology. As the teacher would say, he speaks as one having authority.”

As the prospective purchaser of a used car might point out that the battery was dead and the tires nearly worn out, so Crowell, with his more than usual knowledge of patent interpretation, endeavored to demonstrate the real lack of value (except as an assurance against an unfounded suit) of that for which he was bargaining, as well, by consideration of the subject-matter, to show that the Baker claims were broad enough to dominate the structure he was contemplating putting on the market, namely, that illustrated in Defendant's Exhibit E [Book of Exhibits, p. 143], which, though considerably different in form from that of said abandoned application, was equally covered by certain of said broad claims of said Baker patent.

Comparisons showing that claims of said Baker patent read in letter as well as in spirit on both the abandoned application and Defendant's Exhibit E will be made under later heads. We are now only showing the INTENT AND UNDERSTANDING OF THE PARTIES, and laying the foundation for a consideration of the fraud and undue influence which—IF CROWELL'S SAID LICENSE FROM BAKER DOES NOT MEAN WHAT WE SAY IT DOES—will be demonstrated.

At about the middle of Tr. 147, appellant Crowell, as a witness on his own behalf, testifies:

“During the course of the negotiations between myself and Mr. Mellin, prior to the execution of the two license agreements of August 1, 1935, reference was made to a forfeited and abandoned application such as shown in Defendant's Exhibit G. I had a

conversation with Mr. Mellin concerning what was shown on this abandoned application. That conversation occurred at the Hotel Hayward here in Los Angeles. At the time he had his office up in Oakland, California. The conference was had at the hotel room with him.

As nearly as I can recall, the conversation was during the month of July, 1935. No one was present at the conversation except Mellin and myself. As to what was said in that conversation: Well, I explained to Mellin by making pencil drawings on the hotel stationery there, and by way of illustration I furnished the abandoned application. I showed Mr. Mellin this identical exhibit here, the file wrapper that has been introduced as Defendant's Exhibit G. I told him that was not what I intended to make. I was at liberty to make it. However, I wanted to get a more modern structure, using cement, and I did not want to get involved with the Baker Oil Tools Company in any litigation or misunderstanding.

As to whether I explained to him that at the time I contemplated manufacturing and putting on the market some kind of a device: He understood thoroughly, by way of illustration, by circular.

At this same conversation, after showing him Defendant's Exhibit G, I made pencil drawings by way of that illustration. I also had a couple of pages out of the Oil Weekly, that dated back to 1926. The number of said Oil Weekly was that of September 17, 1926. I showed Mr. Mellin the publication that I refer to at the conversation to which I refer at the Hotel Hayward.

The printed matter, which is headed 'The Oil Weekly, September 17, 1926', and is entitled 'Cementing casings through percolations protects oil sands. New method effectively seals off water without cementing off the oil sands. Harold J. Vance' is the

publication which I referred to. I had that publication or printed matter for ten years. I cut it out of the Oil Weekly. The date of the publication was September 17, 1926. I took it from the publication possibly a day or so after that.

I showed this publication to Mr. Mellin.

(Here the printed matter constituting the publication referred to by the witness was offered and received in evidence without objection as Defendant's Exhibit Z.) (Sent up as a physical exhibit.)

The Oil Weekly was a publication which had a wide distribution in Southern California and this was a regular copy that I purchased on the market. I was a subscriber and had been for years."

At transcript 149, Crowell testifies:

"And then at this meeting, when Mellin came back on July 26th, and he says, 'I can't represent you without having something more definite to offer.' He says, 'I can't go to the Baker Oil Tools Company and tell them to give you this or give you that,' and he says, 'You will have to contend for your own rights'."

At transcript 152, Mr. Crowell, relative to the abandoned application, and said prior publication, continues:

"Referring to Defendant's Exhibit G, file wrapper, and Defendant's Exhibit Z, the publication from The Oil Weekly, and explaining the pertinence of the reference to this as I explained it to Mr. Mellin: As I explained a while ago, Mellin wanted some evidence or some argument on my part to reconcile the Baker Oil Tools that I had a right to make what I intended to make, and he said that he couldn't represent me unless I was licensed, unless I would contend for my license, and it was my purpose to show, by way of these prior art applications, that I already had a right under my previous patents to do just ex-

actly what I intended to do. It was well understood between Mellin and I that we were to give cross-licenses merely to avoid awkward litigation.

Making it clear why I talked about these two exhibits, Defendant's Exhibit Z and Defendant's Exhibit G: I wanted to reconcile Mr. Mellin to the fact that I already had a right to do what I intended to do, and I wanted to show him that the patent under which they gave me a license was already covered by the prior art. In other words, Mellin was in the position of wanting to reconcile the Baker Oil Tool Company to give me a license, but he wanted me to contend for my rights. Mellin at that time really did not want me to take a cheating. I realize that. And that showing was so that he could go to Baker and say, 'Now, here Crowell has already got a right to do that thing that he intends to do.'

I do not mean by that that I intended to make that identical form. I did not tell Mr. Mellin that I wanted to make that identical form. The abandoned claims of that abandoned application, Mr. Mellin thoroughly agreed with me at the time, read on the Baker patent on which they gave me a license; that is the claims which are allowed in this, claim 21, for instance, in Defendant's Exhibit G. That was the subject of the conversation between myself and Mr. Mellin at the time this was shown to him."

There is very little of this testimony of Crowell's that is denied on behalf of appellee Baker.

Near the top of transcript 93, Mellin, testifying as a witness on behalf of appellant, Crowell, makes from memory a sketch of a drawing which he admits Crowell showed him at the time and place indicated by Crowell—just prior to the execution of the two cross-licenses in issue.

This sketch is in evidence as Defendant's Exhibit F, Book of Exhibits, page 147.

At transcript 110, *et seq.*, Mellin practically agrees with Crowell that the abandoned application of Crowell afterwards received in evidence as Defendant's Exhibit G, was that which was shown to him at the time and place in question, and at the top of transcript 111, that it is more accurate than the sketch—although there is no material difference between Mellin's sketch [Defendant's Exhibit F, Book of Exhibits, p. 147] and the drawing of Defendant's Exhibit G, the abandoned application.

As to Defendant's Exhibit Z, The Oil Weekly of September 17, 1926, it is to be noted that Mellin [near top of Tr. 298] does not deny Crowell's testimony that Crowell showed to Mellin and discussed this article. On the contrary, Mellin only testified that he *does not remember*. (This is not of great materiality, however, as the abandoned application in itself was sufficient for Crowell's purposes.)

At Tr. 291 Mellin further admits that his recollection as to what took place at the time of the signing of the cross-licenses is *not clear in detail*. This is not a surprising circumstance, as every attorney has many conferences relating to contracts, so that they have but a passing professional interest to him, while the client with comparatively few of such conferences, and being vitally interested, should, and usually does, remember such details much more clearly.

Nothing Is More Clear in the Record Than That Crowell Did Not Show Defendant's Exhibit Z, "The Oil Weekly" of September 17, 1926, and the Abandoned Application, Defendant's Exhibit G, During Negotiations Resulting in the Exchange of Licenses as a Sample of What He Intended to Put on the Market if Granted the Baker Cross-License [Defendant's Exhibit A, Book of Exhibits, Page 129].

There Can Be No Doubt But That What Crowell Explained and Illustrated to Plaintiff-Appellee, Through Mellin, as the Device He Intended to Manufacture and Sell if Granted the Then Proposed License [Defendant's Exhibit A, Book of Exhibits, Page 129] Was the Structure of Defendant's Exhibit E, Book of Exhibits, Page 143, and That Mellin, Knowing That Crowell Desired the License to Avoid Possible Litigation as a Result of His Then Contemplated Manufacture and Sale of Exhibit E, Led Crowell to Believe That Appellee Baker, Through Mellin, Agreed to Such Coverage, and Could Not and Would Not Deny That Such License Covered Defendant's Exhibit E and, Therefore, Would Protect Crowell From Harrassment by Just Such a Suit as That at Bar.

We now present argument in support of Assignments of Error X [Tr. 341]; XI [Tr. 342]; XIII [Tr. 342]; XIV [Tr. 343]; XV [Tr. 343]; XVI [Tr. 344]; which read: "The Court erred":

"X.

In failing to find that defendant, Erd V. Crowell, fully exhibited and disclosed to the agent and attorney, Oscar A. Mellin, for Baker Oil Tools, Inc., prior to the execution of said agreement of August

1, 1935, the device he intended to make under said agreement and which he believed to be authorized and covered by such agreement, and said agent or attorney, Oscar A. Mellin, acquiesced and agreed to said interpretation, and by his actions and silence and failure to warn defendant, Erd V. Crowell, otherwise, led said defendant to believe that said license of August 1, 1935, from plaintiff to defendant under said Letters Patent 1,859,648, granted a license to make and sell the devices illustrated by Defendant's Exhibit E."

"XI.

In failing to find that unless said license under said Baker Patent 1,859,648, issued May 24, 1932 (Defendant's Exhibit A), covered and included the manufacture and sale of devices such as illustrated in Defendant's Exhibit E, then said defendant, Erd V. Crowell, entered into said agreement through mistake and that said mistake was induced by acts and representations of plaintiff's attorney, Oscar A. Mellin, as well as by his failure to speak when he knew that his actions and silence were leading defendant, Erd V. Crowell, into such mistake."

"XIII.

In failing to find that defendant, Erd V. Crowell, would not have granted the license dated August 1, 1935 (Plaintiff's Exhibit 2), to plaintiff, Baker Oil Tools, Inc., for the monetary consideration therein expressed alone, and that a most important and vital part of the considerations for such agreement moving to defendant, Erd V. Crowell, was the right to make and sell devices like and similar to those illustrated and described in Defendant's Exhibit E, and that said license from plaintiff to defendant (Defendant's Exhibit A) under said Letters Patent 1,859,648, cover-

ing and including said devices like and similar to those described in Defendant's Exhibit E, was the moving consideration which caused defendant Crowell to enter into said coincidentally signed agreements, Plaintiff's Exhibit 2 and Defendant's Exhibit A."

"XIV.

In finding (paragraph IX of the findings of fact) that it is not true that Oscar A. Mellin, acting for plaintiff, Baker Oil Tools, Inc., in negotiating said written agreements, Plaintiff's Exhibit 2 and Defendant's Exhibit A, was familiar with or knew anything about certain inventions owned by defendant, Erd V. Crowell, upon which Letters Patent of the United States were pending."

"XV.

In failing to find that at or prior to the time of the execution of Plaintiff's Exhibit 2 and Defendant's Exhibit A, Oscar A. Mellin, acting for plaintiff, Baker Oil Tools, Inc., in the negotiations which led to the execution of said two agreements, was quite familiar with and well knew that Crowell had invented and had applied for patents on the devices illustrated and described in Defendant's Exhibit E, and further, that the said Oscar A. Mellin and plaintiff, through said Oscar A. Mellin, well knew that defendant, Erd V. Crowell, believed that through Defendant's Exhibit A he was getting from plaintiff the right to make and sell devices such as illustrated and described in Defendant's Exhibit E."

"XVI.

In finding (paragraph X of the findings of fact) that it is not true that plaintiff's attorney, Oscar A. Mellin, at the time of the execution of said license agreements, Plaintiff's Exhibit 2 and Defendant's

Exhibit A, was familiar with or knew anything about preparations then being conducted by defendant, Erd V. Crowell, for the manufacture and sale of the new invention of the said Erd V. Crowell which has since become known as 'The New and Improved Crowell Cementing Shoe With Plug Operated Float Valve for Guilding, Floating and Cementing,' and 'The Crowell Swirler Collar,' illustrated and described in the folder, Defendant's Exhibit E."

At the bottom of Tr. 146 *et seq.* Crowell testifies:

"As to how far I had proceeded with my intention to manufacture and sell devices such as illustrated in Defendant's Exhibit E before the signing of the two agreements, Plaintiff's Exhibit 2 and Defendant's Exhibit A, the licenses of August 1, 1935: I had made manufacturing arrangements, and I had gotten some drawings and blue prints, and so forth. I didn't have the circulars printed until the early part of 1936. I had a patent application pending at about the time or shortly after I got the idea of putting these things on the market, a year before. I mean, covering that particular device. I think it was June 17, 1935, when the first one was filed."

Crowell further testifies [Tr. 147]:

"As to whether I explained this device as shown in Defendant's Exhibit E to Mr. Mellin during any of the negotiations which led up to the signing of the two license agreements of August 1, 1935: Yes, I certainly did."

At Tr. 151 Crowell further testifies:

"I went there to show, for the purpose of illustration, to show Mellin what I wanted to make, but Mellin really didn't pay much attention to any of

my arguments of illustrations, except the pencil drawings that I made. Those pencil drawings showed the device as in my circular. The one printed in the pamphlet is the one I drew out. As to whether I can illustrate on the board or make a sketch on a piece of paper: I am not very good at making sketches, but I remember drawing that out on hotel stationery.

(Here Mr. Mellin stated that he did not have the sketch referred to.)”

Continuing, at Tr. 151, Crowell says:

“During the recess I have prepared the sketch which I referred to as having shown Mr. Mellin in July, 1935. Before offering it in evidence, in response to a request by counsel, I have indicated the different parts as follows: *a* designates the lapideous valve body; B indicates ports; C is a valve; D is the spring. The spring base is indicated by the letter F. E is a tubular member.

At the time I made this drawing or sketch for Mr. Mellin in his hotel room, in July, 1935, I explained to him the different parts. I showed it to him and he knew what I intended to make.

(Here the sketch is offered and received in evidence without objection as Defendant’s Exhibit AA. Book of Exhibits, page 211.)”

After referring to Defendant’s Exhibit G, file wrapper and contents of Crowell’s abandoned application, and Defendant’s Exhibit Z, publication from “The Oil Weekly”, and relating circumstances of the discussion with Mellin prior to the execution of the two licenses in issue concerning said prior art, Crowell, at Tr. 153, continues:

“As to Defendant’s Exhibit AA, that was made at the same time, on hotel stationery, at the same time that I talked about Defendant’s Exhibit Z and Defendant’s Exhibit G. Defendant’s Exhibit AA was just to show him how I intended to apply the lapideous bodies, and what I expected to make.”

At Tr. 157 Crowell testifies that on the very day of the execution of the cross-licenses here in issue, August 1, 1935, he made oath to a new patent application, disclosing, among other things, the subject-matter of Exhibit E [Book of Exhibits, page 143], which also showed exactly the structure of Defendant’s Exhibit AA [Book of Exhibits, page 211], which new application he said was filed in the Patent Office six days later. Then appears the following:

“Q. Did Mr. Mellin say anything about whether or not the license that you were getting from Baker would include that structure of Defendant’s Exhibit AA?

A. Well, yes.

Q. What did he say?

A. Well, he told me— His very words was, he said ‘That is a measure of protection for which you are contending.’”

True, at Tr. 277, Mellin, testifying on behalf of appellee, Baker, on direct, flatly denies that Crowell made and exhibited the sketch, Defendant’s Exhibit AA [Book of Exhibits, page 211], but afterwards, on cross-examination [Tr. 298], this apparent positiveness is retracted and he says, “I don’t think it is true. I am pretty sure he

didn't." This lack of positiveness, in conjunction with Mellin's admission [Tr. 291] that his recollection of this conference "is not clear in detail" clearly, we submit, establishes a preponderance in favor of Crowell's version of the making, exhibition and discussion of Defendant's Exhibit AA at the time and place mentioned.

Near the top of Tr. 158 Mr. Crowell testifies, in answer to a question by the Court, that he relied on Mellin's representation prior to the time of the execution of the two cross-licenses. Then [middle of Tr. 158] appears the following testimony by Mr. Crowell:

"Q. By Mr. Westall: And you believed that the license that you were taking at that time under Patent No. 1,859,648 covered the device illustrated in Defendant's Exhibit AA?

A. I certainly did, yes, sir.

Q. And you believed that if you signed the license you would have a right, unmolested by the Baker Oil Tools Company, to manufacture and sell that device?

A. I certainly did."

At Tr. 159 Crowell also testifies:

"Q. State whether or not if Mr. Mellin had not made those representations, namely, to the effect that you would have a right to manufacture and sell the device of Defendant's Exhibit AA, you would have signed the agreements of August 1, 1935, Plaintiff's Exhibit 2 and Defendant's Exhibit A?

A. I certainly wouldn't.

Q. Please state whether or not a monetary consideration would have influenced you in accepting the

agreement, even without the license to manufacture, use and sell the device of Defendant's Exhibit AA?

A. I certainly would not have given them a license for that amount.

Q. Have you had experience in making a considerable number of licenses and determining the proper license fees to be paid?

A. Yes.

Q. Is the percentage you have mentioned, considering the scope of the patent under which you licensed, an adequate consideration in itself?

A. It is no consideration to speak of.

Q. I notice the license Plaintiff's Exhibit 2 speaks of other good and valuable considerations. Do you know what those other good and valuable considerations mentioned in that license were?

A. It was for the privilege of making those cementing devices under the Baker patent.

Q. Such as illustrated?

A. Such as illustrated.

Q. In Defendant's Exhibit AA?

A. In Defendant's Exhibit AA, yes, sir.

Q. During the time that you had these negotiations, and particularly the conversation last referred to, when you made sketches similar to Defendant's Exhibit AA, your relations with Mr. Mellin were such that you had confidence in his statements?

A. Yes."

The Truth of the Greater Part of Crowell's Testimony as Above Outlined Is Not Denied. Much of it Is Expressly Admitted. Several Doubtful Denials on the Part of Mellin Are More Than Counterbalanced by Overwhelming Surrounding Circumstances—if Not by Their Own Inherent Weakness.

Inconsistencies and Contradictions on the Part of Mellin Also Contribute Their Weight on the Side of Crowell.

Careful Consideration of Mellin's Admissions Establishes the Truth of Crowell's Insistence That Plaintiff-Appellee, Baker, Through Mellin, Knew That Crowell Was Intending to Manufacture Devices Such as Defendant's Exhibit E [Book of Exhibits, Page 143] and That Crowell Was Relying Upon the Cross-License [Defendant's Exhibit A, Book of Exhibits, Page 129] as an Assurance That He Would Not Be Molested by Suit by His Said Licensor in So Doing, and That He was Also Relying Upon the Apparent Agreement Between Himself and Plaintiff-Appellee, Baker, Through Mellin, That Said License Covered Said Exhibit E.

We now present argument in support of Assignments of Error I [Tr. 340]; IV [Tr. 340]; VI [Tr. 341]; and VII [Tr. 341]:

“I.

In decreeing that the license from defendant to plaintiff, dated August 1, 1935, fully authorizes and licenses the plaintiff to do the acts and things complained of by defendant in his counterclaim.”

“IV.

In failing to decree that the license from plaintiff to defendant, dated August 1, 1935, grants or implies a license to make or sell the devices shown in Defendant's Exhibit E in evidence.”

“VI.

In ordering, adjudging and decreeing that defendant's counterclaim be dismissed, and in dismissing said counterclaim.”

“VII.

In decreeing that plaintiff was entitled to costs.”

Obviously, Mellin knew that Crowell was intending to manufacture *something*; for, otherwise, Crowell would not have been insisting upon the cross-license from Baker; indeed, Mellin clearly so admits.

At the bottom of Tr. 105 Mellin testifies:

“As to whether I had any knowledge that there was any intention or progress by Crowell towards manufacturing and selling devices such as illustrated in Defendant's Exhibit E, in June, 1935: During June, 1935, I think during that time he told me that he was going into the business of making cementing equipment. He didn't tell me at that time what he was going to make.”

Near the top of Tr. 106 appears the following statement:

“Mr. Westall: It should be explained to the Court that there is a state court case filed, and it is still pending, for declaratory judgment as to what those different agreements meant, but this issue is more narrow than it was in that case, and we have taken Mr. Mellin's deposition.” [In said state court case.]

At Tr. 107-108-109 appears a rather amazing and unexplained contradiction on a vital point by Mellin of his own previously sworn testimony, as follows:

“Q. In your state court deposition you were asked this question: ‘You did not know that there was any intention or any progress really toward manufacturing and selling devices such as illustrated in Exhibit C [Defendant’s Exhibit E, Book of Exhibits, page 143, in the case at bar] to the complaint, in June, 1935?’ And your answer is: ‘No, I would like to qualify that answer to this extent: Some time about August 1st, right around about that time, perhaps maybe 15 days before, or during that period prior to August 1, 1935, Mr. Crowell had told me that he intended to go into the business of manufacturing well cementing equipment, and that was his reason given to me for wanting this license, Exhibit A. He said he wanted to make a two-valve device. He wanted to explain the construction of what he was going to make, AND I REFUSED TO LISTEN.’ [Our small capitals.]

Now, is that testimony correct?

A. *No, it isn’t.* I remember the circumstance of him wanting to explain an invention before that, and then about that time was when he brought me this abandoned application with the drawing, and at that time he did explain to me what he said he was going to make, and was complaining bitterly that, after he abandoned his application that Baker had, what he called it, sneaked in and gotten the patent, which he contended could be used in a suit for infringement against him for making something which was originally his.

Q. Then that testimony that you gave there that you refused to listen to what he was going to make was not true?

A. *Well, not exactly, no.*

Q. Did you refuse to listen to any explanation of what he made about that time?

A. *No.* At that time, around August 1st, or just prior, this two-valve tool—in fact he even wrote me a letter about it, but before that time he never explained anything he was going to make to me. It was before that time that I wouldn't listen to him, when he became so enthusiastic about his invention.

Q. The next question is: 'So he explained to you the reason he was going to make a device which would come under the license Exhibit A [Defendant's Exhibit A, also in the case at bar] to the complaint, is that correct?' And your answer was: 'He said he wanted to manufacture a two-valve device that was the same as he had a sketch with him or Patent Office drawing, I have forgotten which of an abandoned application which he said was abandoned some time around 1925, where he had two spaced valves with a chamber between them and side ports outside the barrels between these valves. That device showed cast-iron discs with a poppet type valve. He wanted to do away with the cast-iron discs and substitute a cementitious plug in there, to carry these two valves and he said in his opinion the device infringed this patent No. 1,859,648 to the Baker Oil Tools on May 24, 1932.' Is that your testimony now?

A. Yes, I think so. It is a long answer, but I think that is right. I will repeat it. About that time I had the Patent Office drawing of this abandoned application. That was some time in the latter part of July.

Q. Then, to go on, the question is: 'Then he did describe fully at that time the device that he wanted to make under that license?

'A.—That particular device, yes.'

Then the question is: 'You say he attempted or offered to explain a device to you and you did not listen to him?

'A.—That was some other device other than that. He was going into the manufacture of this one he did explain quite specifically to me.

'Q.—But the other device you did not listen to his explanation of what he intended to make under Exhibit A, did you?' And then the answer: 'He did not tell me these other devices were to be made under Exhibit A. He said he had some other devices, as I recall it. I think he even told me he had some applications pending, but I am not sure. I told him I did not want to see any of his new improvements because Baker Oil Tools were also developing new cementing devices, and they might be working on the same ideas, and as long as I did not represent him as patent attorney, I did not want any knowledge of it.'

Is that your testimony now?

A. I think so, yes."

Now it is clear from the foregoing that Crowell did not represent that he wished to make the device of his old abandoned application, and this substantiates Crowell's testimony that he had used the old abandoned application to illustrate the weakness of the Baker patent under which he requested a cross-license, and to show that his new construction came within the same broad general

language of the Baker claims. Obviously, otherwise there was no reason for showing or discussing the old abandoned application.

At the middle of Tr. 111, Mellin testifies that the drawing of the abandoned application, Defendant's Exhibit G, [brought up as a physical exhibit] is more accurate as showing what Crowell exhibited to him than Defendant's Exhibit F, the sketch Mellin made from memory; and referring back to said sketch at Tr. 110, Mellin testifies that Crowell explained that he wanted to make *something like* the sketch, Exhibit F [abandoned application, Defendant's Exhibit G] except "he felt he wanted to substitute a cementitious body for those two cast iron discs that are shown in the sketch, Defendant's Exhibit F [Book of Exhibits, p. 147].

For the sake of additional clarity, consider the following testimony at the bottom of Tr. 112, of Mr. Mellin:

"Q. By Mr. Westall: Will you swear positively that Mr. Crowell told you that the reason he was asking for this license under the Baker patent No. 1,859,648, was that he wanted to be sure that he could make the device of this old abandoned application?"

A. I didn't say at any time that he wanted to make the device of the old abandoned application. My testimony was that he wanted to make something like that, with a cementitious body with two opposed valves."

To illustrate another of Mellin's inaccuracies on a par with his flat contradiction of his testimony given in the State Court deposition above considered: At the top of Tr. 103 Mellin testifies:

“I knew he [Crowell] expected to make a device which came within the description of the patent, *and I knew exactly what that device was. I will draw it for you.*” (Our italics.)

What Mellin drew on the blackboard [Tr. 128] was afterwards reproduced on paper and received in evidence as Plaintiff's Exhibit 7 [Book of Exhibits, p. 81; offered in evidence Tr. 151], and figure A of said exhibit is the one we are interested in. THERE IS NO EVIDENCE THAT CROWELL EVER SHOWED TO MELLIN ANY SUCH DRAWING; MELLIN DOES NOT TESTIFY THAT HE DID; on the contrary, Crowell explains that he showed Mellin Defendant's Exhibit AA [Book of Exhibits, p. 211] showing identically the same structure as Defendant's Exhibit E [Book of Exhibits, p. 143].

Is there anything to support Mellin's statement that he knew “*exactly*” what Crowell desired to make under the then proposed license from Baker, and the implication that Mellin's figure A of said Plaintiff's Exhibit 7 [Book of Exhibits, p. 81] “*exactly*” showed the structure in question?

There is not; on the contrary; Mellin later contradicts himself by testifying that such sketch *was far from accurate as disclosing what Crowell described to him.* To appreciate the force of such inconsistency of Mellin's tes-

timony, let it be noted that figure A of Plaintiff's Exhibit 7 [Book of Exhibits, p. 81] has two valves spaced apart, not connected together, while the device of Defendant's Exhibit E [Book of Exhibits, p. 143] and Defendant's Exhibit AA, its counterpart [Book of Exhibits, p. 211] shows two poppet type valve faces, an upper face and a lower face, each operating on its own valve seat, spaced apart *but connected together* by one double valve body.

What authority did Mellin have for so separating the valves in the sketch [Fig. A, Plaintiff's Exhibit 7, Book of Exhibits, p. 81] which he implies was "*exactly*" what Crowell explained to him? The answer is found middle of Tr. 114:

"Q. Will you swear positively that he said he was going to have two separate and independently operated valves, not joined together?

A. I don't think he was that specific, Mr. Westall. He said he wanted to make this with two valves. I don't recall just—"

TO BRIEFLY SUMMARIZE:

THAT CROWELL, PRIOR TO THE EXECUTION OF THE CROSS-LICENSES, EXHIBITED TO PLAINTIFF-APPELLEE, THROUGH MELLIN, THE ABANDONED APPLICATION, DEFENDANT'S EXHIBIT B, IS ADMITTED; THAT CROWELL ALSO EXHIBITED "THE OIL WEEKLY", DEFENDANT'S EXHIBIT Z, IS NOT DENIED, MELLIN (ADMITTING THAT HIS RECOLLECTION IS INDISTINCT AS TO DETAILS OF THE CONFERENCE) MERELY STATING THAT HE CANNOT REMEMBER.

THAT CROWELL OFFERED TO EXPLAIN, AND DID EXPLAIN A DIFFERENT AND MORE MODERN STRUCTURE IS ADMITTED; THAT CROWELL SPOKE OF NEW PATENTS WHICH HE HAD PENDING OR WAS ABOUT TO FILE IS ADMITTED; THAT THE SUBJECT-MATTER OF THE ABANDONED APPLICATION WAS NOT WHAT CROWELL STATED THAT HE DESIRED TO MAKE IF GRANTED THE CROSS-LICENSE, IS ADMITTED; THAT SUCH DEVICE THAT CROWELL INTENDED TO MANUFACTURE HAD A CEMENTITIOUS LINING IS ADMITTED BY MELLIN; THAT MELLIN'S ILLUSTRATION FROM MEMORY [PLAINTIFF'S EXHIBIT 7, FIGURE A, BOOK OF EXHIBITS, PAGE 81] IS NOT ACCURATE AS SHOWING EXACTLY WHAT CROWELL WAS INTENDING TO MAKE (AS AT FIRST TESTIFIED BY MELLIN) IS ADMITTED.

FINALLY, IN VIEW OF MELLIN'S WEAK DENIALS AND HIS ADMITTED INDISTINCT RECOLLECTION OF DETAILS OF THE CONFERENCE JUST PRECEDING THE EXECUTION AND DELIVERY OF THE CROSS-LICENSES, THAT CROWELL DID MAKE, ON HOTEL STATIONARY, THE DRAWING OF DEFENDANT'S EXHIBIT AA [BOOK OF EXHIBITS, PAGE 211] FULLY DISCLOSING THE SUBJECT-MATTER OF DEFENDANT'S EXHIBIT E, IS, WE SUBMIT, ESTABLISHED BY A GREAT PREPONDERANCE OF THE EVIDENCE.

From the Foregoing, We Have Seen That Crowell's Cross-License [Defendant's Exhibit A, Book of Exhibits, Page 129] Is of No Value Whatsoever Unless It Covers the Device of Defendant's Exhibit E, [Book of Exhibits, Page 143], Which Is Overwhelmingly Proven to Have Been the Device He Intended to Exploit, and to Manufacture Which He Negotiated for and Obtained Said Cross-License.

There Is No Conflict in the Testimony That the Object of Crowell's Insistence Upon This Cross-License Was to Avoid a Suit Like That at Bar: and It Is Admitted That If Said Cross-License Does Cover Defendant's Exhibit E, There Is No Infringement of Any Other Baker Patent.

We here present argument on Assignments of Error XIX [Tr. 345]; and XXI [Tr. 346]:

“XIX.

In finding (Paragraph XI of the Findings of Fact) that it is not true that plaintiff's attorney, Oscar A. Mellin, during the negotiations which led to the execution of the written agreements of August 1, 1935 (Plaintiff's Exhibit 2 and Defendant's Exhibit A), represented to defendant, Erd V. Crowell, in any manner whatsoever that plaintiff, Baker Oil Tools, Inc., could or would not raise any objection whatsoever to the manufacture and sale by defendant Erd V. Crowell, of the subject-matter illustrated and described in Defendant's Exhibit E.”

“XXI.

In finding (Paragraph XII of the Findings of Fact) that it is not true that defendant, Erd V. Crowell, was led, through representations by plaintiff, or of plaintiff's attorney, Oscar A. Mellin, to believe that defendant, Erd V. Crowell, was fully

licensed under the said agreements of August 1, 1935, to make and/or sell all or any of the subject-matter illustrated and described in Defendant's Exhibit E, nor that defendant, Erd V. Crowell, would not be harassed by any charge of infringement on any patents owned or controlled by plaintiff, Baker Oil Tools, Inc., because of the manufacture or sale by defendant, Erd V. Crowell, of the subject-matter described and illustrated in Defendant's Exhibit E."

Remember again that Mr. Crowell, after referring to his conversation with Mr. Mellin regarding the file wrapper of the abandoned application [Defendant's Exhibit G] testifies [bottom of Tr. 147] that such device *was not what he intended to make*, saying:

"I was at liberty to make it. However, I wanted to get a more modern structure, using cement, and I did not want to get involved with the Baker Oil Tools Company in any litigation or misunderstanding."

Near the bottom of Tr. 81, Mellin, testifying in answer to a question as to whether or not these agreements [Plaintiff's Exhibit 2, Book of Exhibits, p. 13, and Defendant's Exhibit A, Book of Exhibits, p. 129] were not "cross-licenses", and after giving the contradictory answer, "Yes and no. I would like to explain * * *", says:

"* * * he [Crowell] wanted to be free from harassment of suit under this double valve patent of ours, and I suppose, in a sense it may be additional consideration, if you want to call it that."

Later, at Tr. 82, Mellin, testifying as to whether Crowell would have executed Plaintiff's Exhibit 2 [Book

of Exhibits, p. 13] if there had not been executed contemporaneously therewith, Defendant's Exhibit A, says:

“Whether he would have signed the other contract or not, I don't know. I don't know whether he insisted upon it. He wanted it, yes. The two agreements were brought down for execution at the same time.”

Near the bottom of Tr. 292, in response to a question by Mr. Bodkin as to whether Mellin told Crowell that under the express terms of the license agreement, that in his opinion as a lawyer, Crowell could manufacture the kind of device that Crowell told Mellin he intended to manufacture, Mellin answered:

“You see, what he was worried about was that we would sue him on this patent if he came out with that two-valve device I have testified to, that he explained to me, and this was to give him assurance that he WOULD^N'T BE SUED, and I probably did tell him that the license in effect prevented Baker from suing him on that two opposed poppet type valve, which he explained to me he wanted, and that is what it was.

Q. In that very particular conversation which you have told us about on direct examination, on August 1, 1935, he asked you for advice, didn't he?

A. No, he didn't.

Q. Didn't he ask your advice—

A. If you want to put it that way, as advice, HE DID WANT TO KNOW IF THIS AGREEMENT WE WERE DISCUSSING GAVE HIM WHAT WE HAD DISCUSSED.”

(Small capitals ours.)

Notice that Mellin here refers to “that two-valve device,” with the implication that Crowell explained that

there would be two separate independently operating valves, and not a valve body with two opposing valve faces. Any such implication, however, is plainly inconsistent with Mellin's admission at Tr. 114, as follows:

“Q. Will you swear positively that he said he was going to have two separate and independently operated valves, not joined together?”

A. I don't think he was that specific, Mr. Westall. He said he wanted to make this with two valves. I don't recall just—”

At Tr. 101, Mellin admits, in effect, that if Crowell manufactured the device he indicated that he intended to manufacture (and this, we contend, was clearly the device of Defendant's Exhibit E), such device *would not come within any of the Baker patents*. The testimony is as follows:

“As to whether during the negotiations or the conversation which preceded the signing of this agreement, I told Mr. Crowell or let him know in any way that if he manufactured the device covered by Baker Patent No. 1,859,648, even though not the precise form, that I intended, on behalf of Baker, to start suit against him and prevent him from making them, on other patents: That was never discussed, as I recall it. We had clearly in mind at that time why he wanted the license, AND FOR THAT REASON IT WAS NOT NECESSARY TO DISCUSS THE OTHER PATENTS BECAUSE THAT DEVICE WOULDN'T COME WITHIN ANY OTHER BAKER PATENTS.” (Our small capitals.)

The Cross-License Crowell Gave to Appellee, Baker [Plaintiff's Exhibit 2, Book of Exhibits, p. 13], Was Admittedly Very Valuable: Appellee Baker Had Negotiated for Five Years Preceding the Execution of Said Plaintiff's Exhibit 2.

As We Have Heretofore Abundantly Seen, if the License Crowell Received as Part Consideration for Said Plaintiff's Exhibit 2, Namely, Defendant's Exhibit A, Did Not Cover, Include, and Permit the Manufacture and Sale of Devices Like Defendant's Exhibit E, Said Cross-License to Crowell Was of No Value to Him Whatsoever.

We here present argument in support of Assignments of Error XXIV [Tr. 347] and XXV [Tr. 347]. The Court erred:

“XXIV.

In finding (paragraph XIV of the findings of fact) that the notice of rescission of license agreement of August, 1935 (Defendant's Exhibit B), served on plaintiff, Baker Oil Tools, Inc., was not well founded and was wholly ineffectual and did not constitute a rescission of said license agreement of August 1, 1935 (Plaintiff's Exhibit 2).”

“XXV.

In failing to find that the notice of rescission of license agreement of August, 1935 (Defendant's Exhibit B), was well founded and was effectual as a rescission of said license agreement of August 1, 1935, and that said notice of rescission was effectual to rescind said license agreement of August 1, 1935 (Plaintiff's Exhibit 2), for the reasons stated in said notice of rescission, as well as others developed upon the trial of this cause.”

At Tr. 299 Mellin admits that he knows that prior to the execution of the cross-license [Plaintiff's Exhibit 2,

Book of Exhibits, p. 13] Crowell had received about \$15,000.00 royalties from a prior licensee of the same two patents, namely, the Lorraine Corporation, whose license Mellin, as attorney for Crowell, had just previous to the institution of the suit at bar, succeeded in having declared properly rescinded for failure to comply with the license provisions.

Again, at the middle of Tr. 299, Mellin testifies:

“It is true I realized that that patent under which he was purporting to give a license to Baker was a valuable patent. Of course, our situation was this, that we had spent about seven or eight thousand dollars in preparing defenses against it.”

At Tr. 307, Theodore Sutter, vice president of plaintiff-appellee, testifies that as a defendant in a suit by Crowell charging infringement of the patents mentioned in plaintiff-appellee’s license from Crowell [Plaintiff’s Exhibit 2, Book of Exhibits, p. 13] plaintiff-appellee had negotiated nearly five years to secure the license in the suit at bar.

At Tr. 328, Sutter further testifies:

“I was anxious at that time to get that licensing agreement. As to how long we had been manufacturing that device which Crowell claimed was an infringement of his patent: Well, in one form and another—you understand that these devices go through a form of change, but talking about the substantive patent, since about 1926. It would be quite difficult to recall approximately how many of these devices we have manufactured from the time we started up until 1934. I don’t recall.”

As to damages and profits which Crowell might have recovered in a suit against plaintiff-appellee, at Tr. 329 appears the following question and answer by Sutter:

“Q. By Mr. Bodkin: Now, you were very anxious at that time to secure that release of royalty claimed, from Mr. Crowell, were you not?”

A. I wouldn't say I was very anxious. I was desirous, certainly.”

The foregoing explains why plaintiff-appellee, as admitted by Mellin, had spent seven or eight thousand dollars preparing defenses.

At 12 Cal. Jur., page 829, §78, citing many cases, it is said:

“While fraud must be clearly proved, direct evidence is not necessary, and it may be proved by circumstantial evidence.”

* * * * *

“Evidence of inadequate consideration may be introduced as a circumstance which may or may not tend to prove fraud *according to its affect as influenced by other proved circumstances, such as want of independent advice and the existence of a confidential relation or incapacity or incompetency on the part of the person defrauded.*” (Our italics.)

Remembering again that unless the cross-license to Crowell covers and includes Defendant's Exhibit E, it is entirely worthless to Crowell, we call attention to 12 Cal. Jur., §32, page 989, where it is said:

“Proof of inadequacy of consideration is not alone sufficient to establish fraudulent intent on the part of a vendor participated in or known to the vendee unless the inadequacy is so gross as to shock the moral sense and create an overwhelming suspicion of fraud. Inadequacy may, however, be coupled with other circumstances so compelling in their nature that the inference of fraudulent intent is irresistible.”

Under a Later Heading We Expect to Clearly Show That Defendant's Exhibit A [Book of Exhibits, p. 129], Crowell License Under Baker Patent No. 1,859,648, Quite Plainly Covers and Includes the Device Shown in Defendant's Exhibit E [Book of Exhibits, p. 143].

Assuming for Present Purposes This to Be True, It Follows That Denial of Crowell's Right to Manufacture and Sell Such Devices Under Said License Amounts in Law to an Eviction.

This Eviction Quite Obviously Results in a Failure of Consideration.

Such Failure of Consideration Warrants Crowell's Rescission [Defendant's Exhibit B, Book of Exhibits, p. 131].

We here present argument in support of Assignments of Error XXXIV [Tr. 350], XXXV [Tr. 350], and XXXIX [Tr. 351]. The Court erred:

“XXXIV.

In finding (Finding of Fact XXII) that the consideration for said agreement of August 1, 1935 (Plaintiff's Exhibit 2) has not failed, nor has any part of said consideration failed.”

“XXXV.

In failing to find that a vital part of the consideration for said agreement of August 1, 1935 (Plaintiff's Exhibit 2), has been caused to fail by the action of plaintiff in instituting this suit charging infringement by the manufacture and sale of devices such as illustrated in Defendant's Exhibit E.”

“XXXIX.

In failing to find that by the very filing of the suit in which this appeal is taken, plaintiff denied and

sought to deny and to limit rights granted to the said defendant under said agreement of August 1, 1935 (Defendant's Exhibit A), in that, notwithstanding the understanding and agreement between plaintiff and defendant through plaintiff's and defendant's attorney, Oscar A. Mellin, as to the scope of said agreement (Defendant's Exhibit A) as covering devices illustrated and described in the folder, Defendant's Exhibit E, plaintiff, ignoring said agreement, is now insisting in this suit that such devices of Exhibit E are infringements."

§3522 of the Civil Code of the state of California reads as follows:

"One who grants a thing is presumed to grant also whatever is essential to its use."

Walker on Patents (6th Ed.), 354, page 431, says:

"* * * where the owner of several patents licenses a person to make, use or sell a particular class of things which, if made, or sold without a license, would infringe all those patents, then that license confers a right under them all. (*Dey v. Stellman*, 1 Fisher 487, 1859.) And this is the rule even where the licensor's title accrued to him, after the date of the license." (*Pratt v. Wilcox Mfg. Co.*, 64 F. R. 591, 1893.)

Again, the same author, Walker, at 355, page 433, after having stated that a licensee shall not be evicted from its enjoyment, continues:

"Such eviction also occurs whenever the licensee is enjoined from acting under it at the suit of the owner

of a senior patent (*Pacific Iron Works v. Newhall*, 34 Connecticut 67, 1867); and, by parity of reasoning, it occurs whenever a judgment or decree is obtained by the owner of a senior patent, against the licensee, for an infringement which consisted of acting under the license, * * *.”

In citing and relying upon the above-quoted authority, we are not overlooking the fact that at the end of paragraph 1 of Defendant's Exhibit A [Book of Exhibits, p. 129], Crowell license under Baker Patent No. 1,859,648, appears the following:

“It is expressly provided that said Erd V. Crowell is not licensed under any other patent, or patents owned or controlled by said Baker Oil Tools, Inc.”

Remember again that Mellin, at Tr. 101, above quoted, admits that if Crowell manufactured the device he indicated he intended to manufacture (and this was surely the device of Defendant's Exhibit E), such device would NOT COME WITHIN ANY OTHER OF THE BAKER PATENTS.

If Mellin did not, in fact, understand what Crowell had intended to explain to him; if Mellin thought that Crowell was intending to make some kind of a double valve device with some kind of a cementitious lining, but was not sure exactly what the structure was (as he has plainly admitted), or if he failed to heed Crowell's attempted description so as not to understand clearly what Crowell expected to manufacture if granted the cross-license, Defendant's Exhibit A [Book of Exhibits, p. 129], is it not

clear that there was a MUTUAL MISTAKE which justifies Crowell's rescission [Defendant's Exhibit B, Book of Exhibits, p. 131].

If Mellin did not, in fact, clearly understand just what Crowell was intending to manufacture under said then proposed license, how can Mellin justify the advice he gave Crowell as admitted, Tr. 291, by Mellin on cross-examination:

“Q. By Mr. Bodkin: Now, at that time, he stated to you, did he not, that he wanted the advice of a lawyer?”

A He didn't put it that way. You see, we had gone into the details of this circumstance, and when you deal with Mr. Crowell, of course, you deal with him, from my knowledge of him, as a man who knows considerable about this business. I HAD TO EXPLAIN TO HIM JUST WHAT HE WAS GOING TO GET. That was what he wanted.” (Our small capitals.)

Remember that Crowell testified, as hereinbefore quoted, that at this conversation, after Crowell had illustrated as Defendant's Exhibit AA [Book of Exhibits, p. 211], the device afterwards described and illustrated in the circular, Defendant's Exhibit E [Book of Exhibits, p. 143], that Mellin stated: “That is the measure of protection for which you are contending.”

Consider this in connection with Mellin's admission, Tr. 293:

“* * * this [the cross-license] WAS TO GIVE HIM ASSURANCE THAT HE WOULDN'T BE SUED, and I prob-

ably did tell him that the license in effect prevented Baker from suing him on that two opposed poppet type valve, which he explained to me he wanted, and that is what it was." (Our small capitals.)

Also, again, in this connection, note Mellin's testimony [Tr. 293] that Crowell DID ask for Mellin's advice during said negotiations as to whether the agreement gave him what they had discussed, and that Mellin did not tell Crowell that Baker had other patents which they would enforce against him if he manufactured that particular device.

At the bottom of Tr. 291, Mellin admits (and remember, this was after five years of negotiations) that he refused to allow Crowell a few hours to have the proposed agreement checked by Crowell's attorney, Westall.

At Tr. 103 (near the bottom of the page) Mellin, after admitting that Crowell had paid to him \$1600 in attorney's fees, declined to advise Crowell that he had better have the clearest kind of a definition of what he contemplated making under the contract, and stated that he did not so advise him because, "You [Mr. Westall] represented him as patent counsel. That was your job; not mine."

We Have Heretofore Been Discussing the Intent of the Parties: What Crowell Certainly Must Have Thought the License, Defendant's Exhibit A, Covered, Namely, the Device of Defendant's Exhibit E, Which, We Believe, Was Actually or Apparently Acquiesced in on the Part of Appellee Baker Through Mellin.

We Now Show That Crowell's Said License, Defendant's Exhibit A [Book of Exhibits, p. 129] Quite Plainly Does Cover and Include the Device Shown in Defendant's Exhibit E, and That, Consequently, Crowell, Was Correct in His Belief and Insistence in Discussions With Mellin, and That If Mellin Did Not Likewise Actually Believe He Was in Error.

We now present argument in support of Assignments of Error XII [Tr. 342], and XLVI [Tr. 353]. The Court erred:

“XII.

In failing to find that defendant, Erd V. Crowell, fully and correctly comprehended and understood the terms and provisions of said license to him of August 1, 1935 (Defendant's Exhibit A) as covering and including and licensing the manufacture and sale by said defendant of devices like and similar to those illustrated and described in Defendant's Exhibit E.”

“XLVI.

In failing to conclude as a matter of law that the scope and effect of Letters Patent 1,859,648, and the license granted to defendant by plaintiff thereunder (Defendant's Exhibit A) covers and includes devices such as illustrated in Defendant's Exhibit E.”

In verifying the fact set forth in our heading, the Court need not be embarrassed by any conflict in the evidence on

any issue: The documents speak for themselves, and in the light of elementary rules of interpretation, they are not ambiguous.

If this is true, there was no fraud, undue influence, or mistake in the inception of the cross-license agreements of August 1, 1935, although there is a failure or denial of consideration by the very institution and maintenance of this suit.

Furthermore, a decision that Crowell got what he thought he was getting, *i.e.*, a license to manufacture and sell the subject-matter illustrated in Defendant's Exhibit E [Book of Exhibits, p. 143] terminates this suit.

Our contention that Crowell's license under said Baker Patent No. 1,859,648 [Defendant's Exhibit C, Book of Exhibits, p. 135] covers and includes the devices shown and described in Defendant's Exhibit E is easily explained and understood. It is based upon the most elementary law that "The claims are the only operative part of a patent" (*Walker on Patents* (6th Ed.), §273); that the claims "measure the invention" (many cases cited by *Walker on Patents* (6th Ed.), §161); "that each claim is considered in effect as setting forth a complete and independent invention" (*Walker on Patents* (6th Ed.), §220, citing many cases); "that the claims are presumed to be patentably different from each other" (same reference); that the only thing Baker had in said patent No. 1,859,648, to license was the subject-matter of each of the claims,—which follows as a necessary corollary; "that the claims cover mechanical equivalents of each element of the combination whether they are mentioned or not" (*Walker on Patents*, §412); that an equivalent is an element of a claim performing the same function in—not exactly—but *substantially the same manner* as that of which it is alleged to be an equivalent (*Walker on Patents* (6th Ed.), §415); that when Baker company (following the language of paragraph 1 of the license, Defendant's Exhibit A, under consideration) did—

“hereby grant to said * * * Crowell the non-exclusive license and right to manufacture and sell devices under the aforesaid patent * * *”

—not specifying any particular claim, but adding—

“with the express limitation that the device which the said * * * Crowell may manufacture and sell must employ poppet type spring pressed valves and not shall employ ball valves or their equivalents as shown in the patent,”

—it meant that Crowell had a license to manufacture and sell the combination described in each and every claim of said Baker patent in which ball valves were not expressly included as elements—which were not expressly limited to ball valves. For instance, claim 4 calls specifically for, as an element, “a ball valve.” By the express terms of the license Crowell is not licensed under this claim regardless of any reading of mechanical equivalents. Other claims, on the contrary, call for simply “valve means” which is much broader than the specific form of valve described as “a ball valve.”

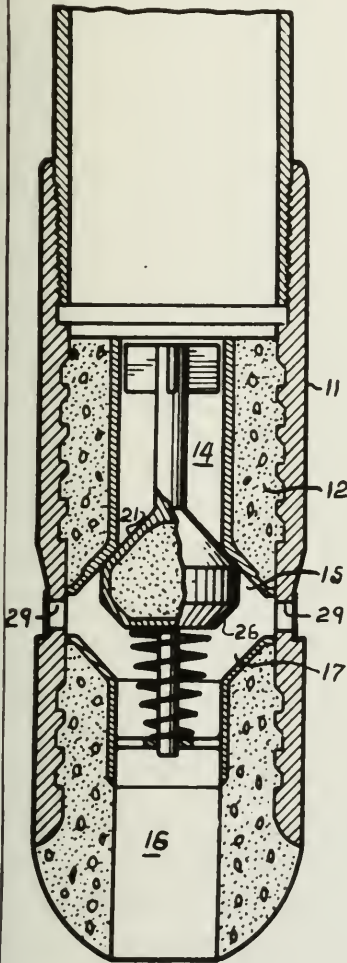
WE INSIST THAT CLAIM 5 OF SAID BAKER PATENT NO. 1,859,648, UNDER THE ADMISSIONS OF MR. MELLIN ON CROSS-EXAMINATION, SQUARELY COVERS AND INCLUDES CROWELL'S DEVICES AS ILLUSTRATED AND DESCRIBED IN DEFENDANT'S EXHIBIT E. ON THE IMMEDIATELY FOLLOWING PAGE WE SET FORTH FOR EASY COMPARISON THE READING OF SAID CLAIM 5 ON ONE OF THE ILLUSTRATIONS OF DEFENDANT'S EXHIBIT E [Book of Exhibits, p. 143]. REMEMBER, UNDER THE LAW, SAID CLAIM IS NOT LITERALLY LIMITED TO EVERY DOT, DASH, AND SYLLABLE IN IT: It should have a fair interpretation to cover equivalents. We submit from this comparison that if this were a case of charged infringement there could be no question under the law that the device of Defendant's Exhibit E compared would be within the claim as such infringement:

1 CLAIM 5 OF BAKER PATENT NO.1,859,648 COMPARED WITH THE
2 DEVICE OF DEFENDANT'S EXHIBIT E TO SHOW THAT IT IN-
3 PRINGS SUCH CLAIM, I.E., COMES WITHIN THE SCOPE
4 OF CROWELL'S LICENSE UNDER SAID BAKER PATENT.

5 THIS IS WHAT CROWELL HAD IN MIND WHEN HE
6 GAVE A LICENSE UNDER HIS ADMITTEDLY VALU-
7 ABLE PATENTS TO BAKER, TAKING THE CROSS
8 LICENSE AS PARTIAL CONSIDERATION.

9 5. A device of the character described comprising --

- 10 11, a tubular member;
11 12, a body formed of cementitious
12 or lapideous material cast
13 directly into the tubular mem-
14 ber and securely anchored there-
15 in to resist dislodgement by
16 pressures exerted at either
17 end thereof.
18 15, said valve body being formed
19 with [a] communicating upper
20 * * valve chamber.
21 17, said valve body being formed
22 with [a] communicating lower
23 valve chamber.
24 14, said valve body being formed
25 with an upper passageway ex-
26 tending from the upper valve
chamber through the upper end
of the plug.
16, said valve body being formed *
* with a lower passageway ex-
tending from the lower valve
chamber through the lower end
of the valve body.
21 and 26, valve means in said
valve chambers preventing up-
ward flow of fluid from the
upper valve chamber to the up-
per passageway and the downward
flow of fluid from the lower
valve chamber to the lower
passageway;
29, said valve body and tubular
member being formed with radial
ports communicating with said
valve chambers between the in-
ner extremities of the upper
and lower passageways.



Note that the claim reads in letter and in spirit upon Defendant's Exhibit E [Book of Exhibits, p. 143] device with the only quibble as to whether the upper portion of the space in which the upper valve moves may be properly called "upper valve chamber" and whether the lower portion of the said space may be called the "lower valve chamber," within the meaning of the claim.

OUR STRONGEST ARGUMENT THAT THE VALVE CHAMBER OF DEFENDANT'S EXHIBIT E, THOUGH NOT DIVIDED BY A CONSTRICTED PASSAGE, IS NEVERTHELESS AN "UPPER VALVE CHAMBER" AND A "LOWER VALVE CHAMBER" WITHIN THE MEANING OF THE CLAIM, IS BASED UPON MR. MELLIN'S CLEAR AND POSITIVE ADMISSIONS.

Remember again that specifying an element in any claim also includes its mechanical equivalent, even though that mechanical equivalent should be better described in other language,—and a mechanical equivalent is an element performing the same function as that of which it is alleged to be an equivalent, not necessarily in exactly the same manner but *substantially* in the same way. (*Walker on Patents* (6th Ed.), §415.)

Whether the two valve chambers are closely adjacent or somewhat separated *is not specified in the particular claim under consideration* (Claim 5). The "upper" and "lower" chambers are separated in the drawings in the Baker patent and are made larger than their connecting passage *to form valve cages for ball valves*; but the license under consideration specifies that poppet type valves may be considered as substitutes for ball valves. Such valves do not require any constriction between valve chambers to provide valve cages. The two closely joined valve spaces or chambers in Defendant's Exhibit E devices

are clearly mechanical equivalents of the more separated valve chambers illustrated in Baker Patent No. 1,859,648, because they perform the same function in *exactly* the same way—not as valve cages—but as spaces in which poppet type valves may operate—in *exactly* the same manner and with the same effect, when only *substantial* identity is required by the definition of a mechanical equivalent.

BUT CONCLUSIVE SUPPORT FOR THIS INTERPRETATION IS FOUND IN THE CLEAR ADMISSION OF MR. MELLIN AND THE CONTENTION OF COUNSEL THAT THE SUBJECT-MATTER OF CROWELL'S ABANDONED APPLICATION, DEFENDANT'S EXHIBIT G [BROUGHT UP AS A PHYSICAL EXHIBIT] IS WITHIN AND COVERED BY SAID LICENSE, DEFENDANT'S EXHIBIT A [Book of Exhibits, p. 129], PROVIDED ONLY THAT IT HAD SOME SORT OF A CAST IN CEMENTITIOUS BODY, NOT AT ALL INSISTING UPON TWO SEPARATE CHAMBERS CONNECTED BY A CONSTRICTED PASSAGEWAY, THE ABANDONED APPLICATION SHOWING A SINGLE CHAMBER UNDIVIDED.

Now the admissions of Mr. Mellin, even without the testimony of Mr. Crowell, are perhaps sufficient under this head.

At Tr. 103, Mellin states that he knew exactly what that device was that Crowell contemplated making if granted the cross-license. He said, "I will draw it for you." Mr. Mellin made a drawing [Fig. A of Plaintiff's Exhibit 7, Book of Exhibits, p. 81]; but it was not correct, among other things, because it showed a constricted passage between two separate chambers in which poppet type valves operated, but later, at Tr. 110-111, Mr. Mellin admits that the drawing of the abandoned application of

Crowell, Defendant's Exhibit G [brought up as a physical exhibit] was the one Crowell showed him at the time of the conference preceding the execution of the cross-licenses of August 1, 1935. At middle of Tr. 111 *et seq.*, Mellin admits that the drawing of said abandoned application is *more accurate* than the one he had previously prepared from memory. At bottom of Tr. 112, Mellin testified that what Crowell said he wanted to make and sell was a device like the abandoned application showed, except with a cementitious body. Note particularly, that Mellin does not say anywhere in his testimony that the device Crowell wanted to make had two separate and distinct spaced apart valve chambers with a constricted passage between; on the contrary, his acceptance of the drawings of the abandoned application as showing the kind of a valve chamber, showed that no line of demarcation between an upper valve chamber and a lower valve chamber was material.

The following question and answer at Tr. 114 is quite significant:

“Q. Will you swear positively that he said he was going to have two separate and independently operated valves, not joined together?”

A. I don't think he was that specific, Mr. Westall. He said he wanted to make this with two valves. I don't recall just—”

Now, as to the two independently operated valves, Mellin admits that he does not recall. Crowell, however, *recalled distinctly*, producing at Tr. 151 a sketch introduced in evidence as Defendant's Exhibit AA [Book of Exhibits, p. 211]—which is exactly like the devices shown in defendant's circular, Defendant's Exhibit E [Book of

Exhibits, p. 143]. If Mellin does *not* recall and Crowell *does distinctly recall*, Crowell's testimony should be accepted, particularly when it is so overwhelmingly supported by surrounding circumstances. Remember, it is not denied and cannot be denied that Crowell executed a patent application on the device shown in Defendant's Exhibit E on the very afternoon that the cross-licenses of August 1, 1935, were executed. Counsel did not object that Crowell's statement of the execution of this document was not the "best evidence." If counsel had objected, we had in our files the identical application which has since issued as a patent; so that there is no question whatsoever but that what Crowell wanted to make was the device of Defendant's Exhibit E, and there is no warrant whatsoever for any conclusion that it might have been some other apparatus.

Beginning at Tr. 251, *et seq.*, Mr. Crowell fully compares Baker Patent No. 1,859,648 with the devices of Defendant's Exhibit E, and shows that each element mentioned in the claims is found in Defendant's Exhibit E [Book of Exhibits, p. 143] performing the same function and leading to the same result.

At page 628, §15, Amdur on "Patent Law and Practice" says:

"Unless the invention resides solely in the specific device of the patent, a change in form does not avoid infringement."

Amdur then quotes:

"'Except where form is of the essence of the invention, it has little weight in the decision of such an issue, and, generally speaking, one device is an infringement of another * * * even though they

differ in name, form or shape. [Machine Co. v. Murphy, 97 U. S. 120, 125.] A close copy which seeks to use the substance of the invention, and, although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an infringement.'” [Ives v. Hamilton, 92 U. S. 426, 430; Sanitary Refrigerator v. Winters, 280 U. S. 30, 42, 74 L. E. 147, 50 S. C. 9; 1929 C. D. 290, 388 O. G. 526.]

Again, at page 629, §15, Amdur, “Patent Law and Practice,” quotes:

“A specific description of an element in a claim does not operate as a limitation to the form shown unless it is of the essence of the invention.’” [Benbow-Brammer v. Simpson, 132 Fed. 614, 617 (Wis. 1904).]

About 1/3 down Tr. 104, Mr. Mellin admits that valves shown in Defendant’s Exhibit E are poppet type valves.

Note that the claim is not limited to two separate independently operated valves. The poppet valves may be connected together so as to move in unison without altering their essential function in any manner. Does the joinder of these two valves together so as to operate in unison avoid infringement?

In the case of *Gruppe Drier & Boiler Co. v. Geiger, Fiske & Koop*, 215 Fed. 110, the United States Circuit Court of Appeals for the Eighth Circuit has held:

“Infringement is not avoided by the joinder of two parts of a patented machine into one if the new one performs the same functions in substantially the same

way; but it is otherwise if the patentee has intentionally made their separability an essential feature of his invention.”

As before reminded, there is nothing in the claim under discussion (claim 5 of Baker Patent No. 1,859,648) which even refers to separability of valve means, much less makes their “separability an essential feature of his invention.”

Again, in the case of *Foster v. T. L. Smith Co.*, 244 Fed. 946, the Circuit Court of Appeals for the Seventh Circuit has held:

“Infringement is not avoided by changes in the mechanism of the patented device, so as not to literally conform to the language of the claims, if the defendant has appropriated the real substance of the invention.”

In the case of *Union Tank Line Co. v. American Car & Foundry Co.*, 202 Fed. 503, it was held by the District Court of New York that—

“To constitute infringement, it is unnecessary to use the entire device; but if parts are used in substantially the same way, and in a similar contrivance, it is infringement.”

The Court of Appeals for the Eighth Circuit in the case of *Lourie Implement Co. v. Lenhart et al.*, 130 Fed. 122, has held:

“One may not escape infringement by adding or subtracting from a patented device, by changing its form, or by making it more or less efficient, while he

retains its principle and mode of operation, and attains its result by the use of the same or equivalent mechanical means.”

True, the device of Defendant’s Exhibit E is a change in form of some of the elements shown in Baker Patent No. 1,859,648. It might be said that the two separate valve means shown in the Baker patent have been made integral in Defendant’s Exhibit E.

At page 632, §18, Amdur on “Patent Law and Practice” says:

“Merely consolidating two elements of the patented combination into one integral member does not avoid infringement.”

Amdur then quotes:

“‘While changing its form, all defendant has accomplished in substance and effect is the consolidation of two elements of the feeding mechanism into one, but without changing the principle upon which the combinative mechanisms operate. This does not avoid infringement.’” [Citing *Parker v. Automatic Machine Co.*, 227 Fed. 449, 452 (N. D. Calif., 1915).]

In the case of *Lamson Co. v. Atlas Systems*, 14 F. (2d) 22, 23, the Circuit Court of Appeals for the Second Circuit has held:

“‘Of course, it makes no difference that an infringer consolidates two features of the claim into a single part of his apparatus.’”

In the case of *Pedersen v. Dundon*, 220 F. 309, the Circuit Court of Appeals for this circuit has held:

“Neither joinder of elements, nor separation of integral parts, will avoid infringement.”

It is true that the joinder of the two poppet type valves of Defendant's Exhibit E are not described or referred to in said Baker Patent No. 1,859,648; neither for that matter, are any forms whatsoever of poppet type valves mentioned or referred to, yet the parties included poppet type valves as covered by such broad claims as claim 5. The claims fairly construed cover the devices of Defendant's Exhibit E. The case of *F. N. Burt Co. v. W. C. Ritchie & Co.*, 251 F. 909, is plainly in point.

“Devices not described, but plainly within the concept in so far as it is patentable and is defined in the claims, infringe the patent.”

In conclusion under this head, we again remind that notwithstanding there is no more division between the upper and lower valve chambers in the device of the old abandoned structure illustrated in Defendant's Exhibit G than there is in Defendant's Exhibit E devices, Mr. Mellin does not insist upon such change of form as at all material—at least he did not so at first insist until after he was compelled to admit that the drawing of said abandoned application, Defendant's Exhibit G, was the correct drawing shown to him by Crowell at the time of the negotiations preceding the execution of the August 1, 1935, cross-licenses.

If the Cross-License to Crowell Does Not Authorize the Manufacture and Sale of Defendant's Exhibit E [Book of Exhibits, p. 143] Then Plaintiff-Appellee, Through Mellin, Was Guilty of Fraud in Inducing Crowell to Accept It in Part Consideration for His Admittedly Valuable License, Plaintiff's Exhibit 2 [Book of Exhibits, p. 13].

This Fraud Was Subtle: An Apparent but Deceptive Assurance to Crowell That He Would Not Be Harassed by Litigation if He Made and Sold a Certain Specifically Described Device—a Legal String in the Form of a Provision That Crowell Was Not Licensed Under Other Patents, Camouflaged by Mellin's Superior Knowledge of the Law and Concealed by Deceptive Professional Assurances and Discouragements Against Crowell's Seeking Competent, Unprejudiced Advice.

We here present argument in support of Assignments of Error IX [Tr. 341], and XXII [Tr. 346]. The Court erred:

“IX.

In finding (paragraph VI of the findings of fact upon which said decree of August 24, 1937, was based) that plaintiff, Baker Oil Tools, Inc., its employees, agents or attorneys, did not misrepresent and did not, nor did any of them, induce said defendant, Erd V. Crowell, to enter into said agreement of August 1, 1935, either through misrepresentation, fraud or undue influence.”

“XXII.

In failing to find that defendant, Erd V. Crowell, was led through representations of plaintiff, or plaintiff's attorney, Oscar A. Mellin, as well as by his silence, attitude and actions, to believe that defendant,

Erd V. Crowell, was fully licensed under the said agreements of August 1, 1935, to make and/or sell all or any of the subject-matter illustrated and described in Defendant's Exhibit E, and that defendant, Erd V. Crowell, would not be harassed by any charge of infringement on any patents owned or controlled by plaintiff, Baker Oil Tools, Inc., because of the manufacture or sale by the defendant, Erd V. Crowell, of the subject-matter described and illustrated in Defendant's Exhibit E."

To add to proper words of conveyance of lot A, the statement "But this instrument is not intended to include lot B," is instantly recognized as a senseless supererogation.

When as competent and skilled a patent lawyer as Mellin added at the end of paragraph 1 of the then proposed cross-license to Crowell [Defendant's Exhibit A, Book of Exhibits, p. 129] the words:

"It is expressly provided that said Erd V. Crowell is not licensed under any other patent or patents owned or controlled by said Baker Oil Tools, Inc.,"

—he must have had SOMETHING in mind. *Is it possible* that while KNOWING that Crowell was insisting upon the cross-license [Defendant's Exhibit A, Book of Exhibits, p. 129] to avoid litigation, and enjoying in a large measure the trust and confidence of Crowell, and assuring him that he would not be sued, that Mellin at and before the execution and delivery of the two cross-licenses EXPECTED TO VIOLATE THAT CONFIDENCE AND TO FALSIFY SAID ADVICE BY LATER INSTITUTING THIS SUIT?

Remember again that Mellin has ADMITTED [Tr. 81] that he knew Crowell “wanted to be free from harassment of suit under this double valve patent of ours,” and that [Tr. 82] the two agreements were executed contemporaneously, one as consideration for the other; that Mellin admits that Crowell “wanted” (or demanded or insisted upon) said license; that the consideration Crowell was giving in his cross-license to Baker was not only the compromise of long-continued infringement of what Mellin admits [Tr. 299] was a valuable patent, and to defend which plaintiff-appellee spent seven or eight thousand dollars; but was a license for the future life of said patent; that as testified to by Mellin [Tr. 292], this cross-license was to “give Crowell the assurance that he would not be sued,” and that Mellin admits that he did tell Crowell “that the license, in effect, prevented Baker from suing him,” and that [Tr. 293] “If you want to call it ‘advice,’ Crowell did want to know if this agreement we were discussing gave him what we discussed”; and that Mellin, understanding that Crowell was thus asking and, no doubt, to a considerable extent, *relying upon* such advice, Mellin reassured and advised him.

At Tr. 82 and top of Tr. 83 Mellin admits he was attorney for Crowell during the time these cross-licenses were being negotiated for. At last line, Tr. 82, he says: “My last bill was dated August 1 [1935] for services during July.” Mellin also admits [Tr. 83] that after the execution of these two cross-licenses he continued to do other work as attorney for Crowell.

Crowell was a layman—not a lawyer. We would not have rules of professional ethics against representing both sides of a controversy if there were not laymen, at least, who did not understand the difficulty, or even, impossibility, of a lawyer functioning as unbiased representative of both parties. At Tr. 161, Crowell testifies that he thought Mellin was representing him in just getting up these licenses. At the bottom of the same page Crowell states that he did not believe Mellin was working against his (Crowell's) interest. He says, "He helped me to clear up the title to my patent," and at the bottom of Tr. 150 Crowell testifies, "I had an arbitrator already hired and paid, and a fellow to advise me on that particular subject, and he agreed to do it."

Later, at Tr. 175, Crowell testified that the "arbitrator" he referred to was Oscar A. Mellin, and that the word "arbitrator" was not the proper word he should have used—that he meant "negotiator," or "representative," or "lawyer."

At Tr. 176 Crowell testifies that during the month of January and February, 1935, he paid Mellin \$800.00 for services in the *Lorraine* case to clear the title of the patents of this later executed cross-license [Plaintiff's Exhibit 2, Book of Exhibits, p. 13]. This title-clearing suit had been commenced while Mellin was employed by the firm of Townsend & Loftus, and at the bottom of Tr. 196 Crowell testifies that he paid to Mellin and his former employers, Townsend & Loftus, for this work \$1500 or \$1600. Remember, this employment was and had continued during all the negotiations resulting in the execution of the two cross-licenses.

The Consideration of Plaintiff's Exhibit 1 [Book of Exhibits, Page 1, Offered in Evidence, Tr. 69], Being an Agreement Dated August 7, 1934, to Settle Litigation Between Baker Oil Tools, Inc., and Erd V. Crowell, Which Agreement Had Been Entered Into a Year Prior to the Execution and Delivery of the Two Cross-Licenses in Suit, Presented a False and Immaterial and Misleading Issue, as Such 1934 Agreement Had Been Expressly Cancelled by Said Plaintiff's Exhibit 2 [Book of Exhibits, Page 13], Paragraph 13 Thereof, and Was of No Pertinence or Effect in This Suit.

We now present argument in support of Assignments of Error LVIII [Tr. 357], and LXI [Tr. 358], which read as follows: "The Court erred":

"LVIII.

In ruling, during the trial of the above-entitled cause, as indicated in the following quotation of evidence, objection and exception [Rep. Tr., p. 11, line 11, *et seq.*]:

'Q. [By Mr. Bledsoe to John P. Rosenlind, a witness called on behalf of plaintiff.] In connection with the agreement, Exhibit 1, I will ask you if, pursuant to the provisions of Paragraph 6 of that agreement, the Baker Company rendered to Mr. Crowell, the other party to the agreement, a statement showing the number and sizes of the devices manufactured and sold by or for Baker during the preceding calendar month.

Mr. Westall: That is objected to as not material to anything in this present controversy. There will not be any contention as to whether Baker paid or

carried out the provisions of that agreement, of anything in the agreement. There is no issue on that score.'

(Here follows argument by Mr. Bledsoe.)

'Mr. Westall [continuing Rep. Tr. p. 13, line 10, *et seq.*] The agreement of 1935 expressly provides, in paragraph 13, that all prior negotiations between the parties are merged in this agreement. And as long as there is no issue regarding the performance of that prior agreement the evidence is entirely irrelevant and immaterial.'

(Here Plaintiff's Exhibits 1 and 2 were read into the record.)

* * * * *

'Mr. Westall [continuing Rep. Tr., p. 26, line 26, *et seq.*] If the court please, I just want to say this: It is admitted, I believe that that contract which has just been read is entirely superseded, and in direct terms it is so stated in the license under which this present claim, paragraph 13 of this license, was executed. I am talking about Plaintiff's Exhibit No. 2. It said, "This agreement entirely cancels and renders void and of no effect all prior agreements, both written and oral, between the parties hereto." That provision makes the contract just read entirely immaterial to any controversy here until we raise some question of the consideration moving from Baker to us, and it is inadequate unless we go into all the prior considerations.

The Court: The difficulty, however, is, where the question of the existence of a license is in dispute, the preliminary agreement, the payment of the consideration called for, may have a very important bearing upon the existence or non-existence of the very agreement in this suit.

Mr. Mellin: If Your Honor please, Mr. Westall in his opening statement made the statement that the circumstances surrounding the entering into of the agreement of 1935 were fraudulent, and one of the reasons why he wanted to rescind. Now, in the next breath, he wants to contend that all the surrounding circumstances are not material.

The Court: Objection overruled.

Mr. Westall: Exception.’ ”

“LXI.

In failing to conclude as a matter of law that the institution of this suit by plaintiff amounted to an eviction under Crowell’s license, Defendant’s Exhibit A, and such eviction (said Crowell license constituting a consideration for plaintiff’s license, Plaintiff’s Exhibit 2) resulted in a failure of consideration for said Plaintiff’s Exhibit 2.”

We believe the preceding quoted assignments of error in the light of the foregoing argument, show the soundness of our objection and exception. We merely repeat that paragraph 13 of said agreement to settle litigation, Plaintiff’s Exhibit 2 [Book of Exhibits, p. 13], reading:

“13. This agreement entirely cancels and renders void and of no effect all prior agreements both written and oral between the parties hereto,”

eliminates as irrelevant and immaterial any consideration of the performance or non-performance under said agreement of 1934, as the two cross-licenses here in suit were substituted for it.

Conclusion.

Plaintiff-appellee faces this dilemma: If Defendant's Exhibit A, Book of Exhibits, page 129, does not cover, embrace, and include the device of Defendant's Exhibit E, then it was no consideration whatsoever for defendant's contemporaneously executed and delivered cross-license, Plaintiff's Exhibit 2, Book of Exhibits, page 13; while if it does, as we contend, cover, embrace, and include the device of Defendant's Exhibit E, then the institution of this suit, and the decision of the District Court herein constitutes an eviction of defendant-appellant under said license, in either case there being a failure of consideration warranting defendant-appellant's rescission [Defendant's Exhibit B, Book of Exhibits, p. 131].

In view of the uncontroverted testimony of Crowell concerning the reasons for his insistence upon the cross-license, Defendant's Exhibit A, and the circumstances surrounding its execution, including the full disclosure of the device he intended to make under it if granted such license, and the clear admissions of Mr. Mellin as to his relationship and advice to Crowell, if Defendant's Exhibit A, Book of Exhibits, page 129, fails to cover and authorize the manufacture and sale of the device of Defendant's Exhibit E, there has been fraud or undue influence which should validate Crowell's said rescission.

That the decree appealed from should be reversed with costs is

Respectfully submitted,

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